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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

CHRIS WILCOX,

Plaintiff and Appellant,

v.

TARGET CORPORATION et al.,

Defendants and Respondents.

E054449

(Super.Ct.No. CIVRS1103172)

OPINION

APPEAL from the Superior Court of San Bernardino County. Ben T. Kayashima, Judge. (Retired judge of the San Bernardino Super. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Affirmed.

Martin Reiner for Plaintiff and Appellant.

Dorsey & Whitney, Mandana Massoumi and Jill A. Hammerbeck for Defendants and Respondents.

Plaintiff Chris Wilcox sued defendant Target Corporation (Target), and its attorneys, Dorsey & Whitney LLP (Dorsey), and Mandana Massoumi (Massoumi) alleging fraud by false promise, and violations of Government Code section 12940,

subdivisions (h) (retaliation/discrimination), (j) (harassment), and (k) (failure to take steps necessary to prevent discrimination and harassment), in regard to defendants' alleged representations in the settlement of a previous lawsuit between Wilcox and Target involving Target's termination of Wilcox's employment. Defendants filed a special motion to strike the complaint as a strategic lawsuit against public participation, commonly referred to as an anti-SLAPP motion, pursuant to Code of Civil Procedure section 425.16.¹ The trial court granted the motion, and judgment was entered in favor of defendants. Wilcox appeals, contending his claims against defendants are not subject to an anti-SLAPP motion. Based on our independent review, we affirm.

I. PROCEDURAL BACKGROUND AND FACTS

We derive the statement of the facts from the complaint and from the evidence submitted in support of and against the anti-SLAPP motion.

Wilcox is a former employee of Target. On June 11, 2009, Target terminated his employment as an investigator after he violated Target's off-site surveillance directives by following a suspected shoplifter in his vehicle on the freeway without permission. Wilcox applied for and received unemployment benefits with the Employment Development Department (EDD). His application stated that he had not followed the suspected shoplifter off the premises until receiving permission from his supervisor, in compliance with Target's policy. Target disputed the granting of benefits on the ground that Wilcox had been terminated for cause because he had lied to his supervisor in order

¹ All further statutory references are to the Code of Civil Procedure unless otherwise indicated.

to obtain permission to go off-premises. When Wilcox called his supervisor to obtain permission to go off premises, he was in fact already off premises following the suspected shoplifter in his car.

On November 25, 2009, the EDD determined Wilcox had been terminated for cause and ordered him to return the unemployment benefits he had received from the state in the amount of \$6,200.00. On March 15, 2010, the EDD's Unemployment Insurance Appeals Board denied Wilcox's attempted appeal of the decision as untimely.

On June 10, 2010, one year after his termination and seven months after the EDD's decision ordering him to return the unemployment benefits, Wilcox sued Target, alleging discrimination and wrongful termination. He alleged he was discriminated against because of a worker's compensation injury, and terminated for that same reason and/or because of his refusal to falsify an incident report. Target, represented by Dorsey and Massoumi, removed the action to the United States District Court, Central District of California, on August 2, 2010. Wilcox's complaint did not raise any claims relating to the unemployment proceedings, including the denial of unemployment benefits and the EDD's order that he return the benefits in the amount of \$6,200.00.

On January 21, 2011, Wilcox and Target entered into a confidential settlement agreement. Pursuant to the parties' request, the district court dismissed that action with prejudice on January 24.

On March 29, 2011, Wilcox filed the instant action against defendants. He amended the complaint on April 22, alleging claims for fraud by false promise, and violation of Government Code section 12940, subdivisions (h), (j), and (k). Wilcox

sought compensatory damages, including the payment of his debt (\$6,200.00) to the EDD, punitive damages, a cease and desist order from “engaging in such further wrongdoing again,” attorney fees, costs of suit, and prejudgment interest.

According to the allegations in the complaint, Target terminated Wilcox in June 2009 and challenged his award of unemployment benefits before the EDD, ultimately convincing the EDD to reverse the charge from Target’s reserve account, thus creating a \$6,200.00 debt owed by Wilcox. Wilcox claims that he challenged his termination in a separate litigation that “was disposed of by way of a settlement” The complaint alleges that pursuant to the settlement defendants “made specific representations to WILCOX to the effect that TARGET would relieve WILCOX of that approximately \$6,200.00 debt.” The first cause of action for fraud by false promise alleges that defendants represented in the written settlement agreement that Target would relieve Wilcox of all debts, including the \$6,200.00 to the EDD which “had been incurred in relation to the termination of WILCOX’s employment with TARGET.” Wilcox asserts that Target never relieved him of this debt. The second cause of action alleges that defendants violated Government Code section 12940, subdivision (h) “by engaging in misconduct which is retaliatory against WILCOX for WILCOX having previously sought the vindication of his rights under Government Code Section 12940 in the prior litigation” The third cause of action alleges that defendants violated Government Code section 12940, subdivision (j), “by engaging in misconduct which is harassing of WILCOX.” And the fourth cause of action alleges that Target violated Government Code section 12940, subdivision (k) “by failing to take all reasonable steps necessary to

prevent discrimination and harassment from occurring to WILCOX.” Specifically, Wilcox claimed disparate treatment “on about or before 12/30/2010” by defendants for Wilcox’s “having properly engaged in protected activity by his prior FEHA complaint and superior court lawsuit against Target” (Capitalization omitted.)

On June 6, 2011, defendant filed an anti-SLAPP motion, striking Wilcox’s claims pursuant to section 425.16. Defendants argued that Wilcox’s claims arose out of statements made in connection with the litigation and settlement of a lawsuit, which are “protected activity.” (*Seltzer v. Barnes* (2010) 182 Cal.App.4th 953, 963 (*Seltzer*).) Alternatively, defendants argued that Wilcox lacked a probability of prevailing on the merits of his claims. The trial court agreed with defendants and granted their motion. On July 7, 2011, judgment was entered in favor of defendants, who were awarded reasonable attorney fees in the amount of \$5,040.00.

II. STANDARD OF REVIEW

The anti-SLAPP statute, section 425.16, authorizes a defendant to file a special motion to strike any cause of action arising from an act in furtherance of the defendant’s constitutional rights of free speech or petition for redress of grievances. (*Flatley v. Mauro* (2006) 39 Cal.4th 299, 311-312 (*Flatley*).) The purpose of the statute is to prevent the chilling of the valid exercise of these rights through “““abuse of the judicial process,””” and, to this end, is to “““be construed broadly.””” (§ 425.16, subd. (a); *Flatley, supra*, at pp. 312-313.) While the statute was originally intended “to protect nonprofit corporations and common citizens ‘from large corporate entities and trade associations’ in petitioning government [citation] . . . now it has been broadened to

protect large corporations and trade associations [Citation.]” (*USA Waste of California, Inc. v. City of Irwindale* (2010) 184 Cal.App.4th 53, 66. The anti-SLAPP statute establishes a two-step procedure under which the trial court evaluates the merits of a plaintiff’s cause of action at an early stage of the litigation. (*Flatley, supra*, at p. 312.)

First, the defendant must show that the cause of action arose from protected activity, i.e., activity in furtherance of the defendant’s constitutional right of petition or free speech. (§ 425.16, subd. (b)(1); *Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 67 (*Equilon*).) A defendant meets its threshold burden of demonstrating that a cause of action arises from protected activity by showing that the act or acts underlying the claim fit one or more of the categories described in section 425.16, subdivision (e). (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 88 (*Navellier*).) Subdivision (e) of section 425.16 provides, in part, that an “act in furtherance of a person’s right of petition or free speech,” includes, among other things, “(1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law, [and] (2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law” Communications made in preparation for or in anticipation of bringing an action or other official proceeding fall within the ambit of these subdivisions and are not required to pertain to an issue of public interest. (*Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1115; *Rohde v. Wolf* (2007) 154 Cal.App.4th 28, 35.)

Second, if the trial court determines the defendant has met its initial burden, the burden shifts to the plaintiff to demonstrate a reasonable probability of prevailing on the merits of his cause of action. (§ 425.16, subd. (b)(1); *Equilon, supra*, 29 Cal.4th at p. 67.)

We independently review orders granting or denying a motion to strike under section 425.16. (*Flatley, supra*, 39 Cal.4th at p. 325; *ComputerXpress, Inc. v. Jackson* (2001) 93 Cal.App.4th 993, 999 [Fourth Dist., Div. Two].)

III. DISCUSSION

Wilcox alleged causes of action for fraud by false promise, and violations of Government Code section 12940, subdivisions (h) (retaliation/discrimination), (j) (harassment), and (k) (failure to take steps necessary to prevent discrimination and harassment).

““Promissory fraud” is a subspecies of the action for fraud and deceit. A promise to do something necessarily implies the intention to perform; hence, where a promise is made without such intention, there is an implied misrepresentation of fact that may be actionable fraud.’ [Citation.] ‘An action for promissory fraud may lie where a defendant fraudulently induces the plaintiff to enter into a contract. [Citations.] . . .’ [Citation.]” (*Agosta v. Astor* (2004) 120 Cal.App.4th 596, 603.) That is the gist of the allegations here—that, but for certain representations made by defendants, Wilcox would not have entered into the settlement agreement and dismissed his federal court action against them. Specifically, Wilcox argues that defendants misrepresented they would pay the \$6,200.00 owed by him to the EDD. “The elements of fraud, which give rise to the tort action for deceit, are (a) misrepresentation (false representation, concealment, or nondisclosure);

(b) knowledge of falsity (or “scienter”); (c) intent to defraud, i.e., to induce reliance; (d) justifiable reliance; and (e) resulting damage.’ [Citations.]” (*Lazar v. Superior Court* (1996) 12 Cal.4th 631, 638.)

To establish a prima facie case of retaliation in violation of Government Code section 12940, subdivision (h), plaintiff must show he engaged in a protected activity; that Target took adverse employment action against him; and there was a causal link between the protected activity and the adverse employment action. (*Flait v. North American Watch Corp.* (1992) 3 Cal.App.4th 467, 476.) The law prohibiting harassment (Gov. Code, § 12940, subd. (j)) is violated when the workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim’s employment and create an abusive working environment. (*Nazir v. United Airlines, Inc.* (2009) 178 Cal.App.4th 243, 263.)

A. First Prong: Protected Activity

Defendants contend that each of the challenged causes of action arises from protected activity because they each involve statements made to the EDD or in connection with the settlement of Wilcox’s discrimination action. Such statements, they assert, constitute protected activity as statements “made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law” (§ 425.16, subd. (e)(2); *Seltzer, supra*, 182 Cal.App.4th at p. 963.) We agree.

As defendants note, the primary factual allegations in Wilcox’s complaint involve Target’s termination of Wilcox’s employment in June 2009, namely, that Target challenged Wilcox’s award of unemployment benefits in an administrative action before the EDD resulting in reversing the \$6,200.00 award, and that defendants “made specific representations to [Wilcox] to the effect that [Target] would relieve [Wilcox] of that approximately \$6,200.00 debt.” Defendants’ statements made to the EDD or in connection with the settlement of Wilcox’s federal action fall within the protection of section 425.16, subdivision (e)(2), which provides that speech protected by the anti-SLAPP statute includes “any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law” (*Dible v. Haight Ashbury Free Clinics, Inc.* (2009) 170 Cal.App.4th 843, 850 [allegedly defamatory statements made to the EDD in connection with a plaintiff’s claim for unemployment benefits were part of an official proceeding and were therefore privileged under section 425.16, subdivision (e)(1) and (2)]; *Seltzer, supra*, 182 Cal.App.4th at p. 963 [“settlement negotiations are an exercise of the right to petition and statements made as part of such negotiations are in connection with the underlying lawsuit for purposes of section 425.16, subdivision (e)(2)”]; *Navarro v. IHOP Properties, Inc.* (2005) 134 Cal.App.4th 834, 842 (*Navarro*) [“allegedly fraudulent statements within the context of negotiating the stipulated judgment” are within the scope of section 425.16].)

Notwithstanding the above, Wilcox argues “Fraud is not a valid exercise of free speech, nor of the right to petition for redress of grievances.” He claims that if defendants “are allowed to defraud an opposing litigant out of the benefit of the express terms of the settlement agreement, and then can enjoy civil immunity by hiding behind the anti-SLAPP statute, and cannot be held to perform as promised, then the entire basis for civil litigation for the resolution of civil disputes by settlement is then immediately obliterated.” Wilcox cites four cases: *Blackburn v. Brady* (2004) 116 Cal.App.4th 670 (*Blackburn*); *Wang v. Wal-Mart Real Estate Business Trust* (2007) 153 Cal.App.4th 790 (*Wang*); *United States Fire Ins. Co. v. Sheppard, Mullin, Richter & Hampton LLP* (2009) 171 Cal.App.4th 1617 (*United States Fire*); and *California Back Specialists Medical Group v. Rand* (2008) 160 Cal.App.4th 1032 (*Rand*). In *Blackburn*, the defendant argued the fraud cause of action was subject to the anti-SLAPP law; however, the court held that the cause of action involved “a purely business type event or transaction” which did not arise from protected activity under the anti-SLAPP statute. (*Blackburn, supra*, 116 Cal.App.4th at p. 677.) The gravamen of the plaintiff’s fraud cause of action was the defendant’s bidding up the price of real property without the intent to perform, resulting in plaintiff paying a higher price for the property at a sheriff’s auction. (*Id.* at p. 676.) The *Blackburn* court explained that defendant “fails to appreciate that the fraud cause of action does not arise from an act of free speech or right of petition for the redress of a grievance, but rather only from his actions which affected the bidding at a court ordered sale, which in essence is an event where offers to buy property are received according to certain requirements. Plainly, even construing the gravamen of *Blackburn*’s third cause

of action, as Brady does, as fraud committed in his bidding at the sheriff's auction, it is a purely business type event or transaction and is not the type of protected activity contemplated under section 425.16, subdivision (e). [Citations.]" (*Id.* at pp. 676-677.)

In *Wang*, plaintiffs sold a portion of their land to Wal-Mart with the understanding that Wal-Mart would relocate an access road that plaintiffs needed to retain. (*Wang, supra*, 153 Cal.App.4th at pp. 795-798.) However, Wal-Mart sought and obtained a city resolution that vacated the road and replaced it with emergency access and an alley. (*Id.* at p. 797.) Plaintiffs sued for breach of contract and fraud. (*Id.* at pp. 797-798.) Wal-Mart responded with an anti-SLAPP motion, arguing that the allegations in the complaint arose from protected petitioning activity, namely, seeking and obtaining development permits. (*Wang, supra*, at p. 798.) The trial court granted the motion and the appellate court reversed. The court held that the protected activity was merely incidental or collateral to the unprotected activity alleged in the complaint. (*Id.* p. 809.) The main thrust of the complaint challenged the manner in which Wal-Mart dealt with the plaintiffs; its actions in obtaining governmental permits and approvals were collateral to the private dealings. (*Ibid.*)

In *United States Fire*, plaintiff filed suit against former attorneys for damages and an injunction to prevent them from representing opposing parties in litigation on the grounds of an alleged conflict of interest. (*United States Fire, supra*, 171 Cal.App.4th at pp. 1620-1621.) Defendants filed an anti-SLAPP motion, which was denied; however, the trial court found that the complaint arises out of protected activity. (*United States Fire, supra*, at p. 1620.) On appeal, our colleagues in the Second District, Division Three

disagreed with the lower's court's conclusion that the complaint arises out of protected activity. (*Ibid.*) In reaching this conclusion, the appellate court stated that "the principal thrust of the misconduct averred in the underlying complaint is the acceptance by Sheppard Mullin of representation adverse to U.S. Fire. . . . Thus, reference to protected activity is only incidental to the principal thrust of the complaint." (*Id.* at p. 1628.)

Finally, in *Rand*, defendant sued an attorney seeking payment pursuant to liens on the grounds the attorney failed to notify defendant when the personal injury cases were complete, and disbursed the proceeds from those cases without withholding funds owed to defendant pursuant to its liens. (*Rand, supra*, 160 Cal.App.4th at p. 1035.) The attorney filed an anti-SLAPP motion which was denied by the trial court. The attorney appealed claiming his conduct was protected activity because he disbursed the funds as an attorney and was representing clients in the underlying actions. The appellate court disagreed, holding that defendant's "claims did not arise from any act in furtherance of [the attorney's] right to petition or his right to free speech." (*Rand, supra*, at p. 1037.) Here, the complaint was "based on the underlying controversy between private parties about the validity and satisfaction of the liens. These issues were never under consideration in any court or official proceedings until [plaintiff] filed the current action." (*Ibid.*)

Wilcox's reliance on these cases is misplaced. In *Blackburn* and *Wang*, the protected activity was incident to the nature of the lawsuit which arose from a business deal. In *United States Fire* and *Rand*, both involving the actions of attorneys, the primary thrust of the allegations did not involve the attorneys' actions representing their clients.

Rather, the principal thrust of the misconduct was independent of their representations. Here, in contrast, Wilcox's primary complaint involves statements made by defendants to the EDD and during settlement of Wilcox's federal court action. Wilcox disagrees. He contends that defendants "are trying to trick [this court] into falsely believing the litigation underlying this appeal is about statements the [defendants] made. But in reality, the triggering event causing [Wilcox] to file the subject lawsuit is the failure of the [defendants] to perform, not statements."

In order to evaluate defendants' alleged "failure" to perform, we turn to the confidential settlement. Although we note that it has been sealed, Wilcox referred to it in his opening brief, describing the specific provisions as requiring Target to pay \$25,000.00 to Wilcox and \$15,000.00 to Wilcox's attorney, "pertaining to . . . [Wilcox's] employment and termination of employment with [Target] and all claims which could have been asserted . . . [Target] hereby forever relieves . . . [plaintiff Wilcox] from any and all known . . . debts . . . arising out of any act or omission occurring before the [plaintiff's] execution of this Agreement.'" Apparently, Wilcox contends that the \$6,200.00 debt to EDD "pertained to" Wilcox's employment and thus settlement agreement expressly provided for Target "to 'relieve' [Wilcox] of that debt." We disagree.

According to the relevant pleadings that resulted in execution of the confidential settlement agreement, Wilcox did not allege any claim to recover the \$6,200.00 that EDD ordered him to return to the state. Rather, Wilcox's primary complaint against Target was its alleged wrongful acts in terminating his employment. He alleged he had suffered

an industrial injury on or about January 15, 2007, and that Target thereafter terminated him under false pretexts. Specifically, he claimed that Target accused him of violating the company's directives for an "Assets Protection Specialist" by following a shoplifting suspect off the store's premises. He further asserts that when he refused to falsify the incident report, Target hired someone who "came into a supervisory capacity to [Wilcox], and who was a friend of the apprehended [shoplifting suspect]," and then terminated Wilcox's employment. Nothing in the complaint references the proceedings before the EDD or the requirement that Wilcox return the \$6,200.00 to the state. Likewise, nothing in the confidential settlement agreement references the \$6,200.00. Thus, Wilcox's assertion that defendants misrepresented that they would pay the \$6,200.00 on behalf of Wilcox is without merit. If the sum was never identified in the complaint, it would not have been part of the settlement.

Moreover, any statements made during settlement negotiations which Wilcox contends were misrepresentations of defendants' intent are within the scope of section 425.16. (*Seltzer, supra*, 182 Cal.App.4th at pp. 963-964.) In *Navellier*, plaintiffs sued defendant, alleging he had misrepresented his intent to be bound by a release in a previous federal action. (*Navellier, supra*, 29 Cal.4th at p. 87.) Our state's highest court held that defendant's negotiation and execution of the release involved "statement[s] or writing[s] made in connection with an issue under consideration or review by a . . . judicial body' [citation], i.e., the federal district court" (*Id.* at p. 90.) In *Navarro*, it was alleged that the defendant had made fraudulent promises in exchange for stipulated judgment in an earlier unlawful detainer action. (*Navarro, supra*, 134 Cal.App.4th at pp.

841-842.) Following *Navellier*, our colleagues in Division Three held that the case before it, “concerning allegedly fraudulent statements within the context of negotiating the stipulated judgment[,]” fell within the scope of section 425.16, subdivision (e)(2). (*Navarro, supra*, 134 Cal.App.4th at p. 842.) Our colleagues also cited to *Dowling v. Zimmerman* (2001) 85 Cal.App.4th 1400, 1418-1420, where the court held that a claim for misrepresentation, arising from the defendant’s negotiation of a stipulated settlement of an unlawful detainer action, was within the scope of section 425.16, subdivision (e)(2). (*Navarro, supra*, 134 Cal.App.4th at p. 842.)

Based on the above, the trial court correctly granted defendants’ anti-SLAPP motion under the first prong of the analysis.

B. Second Prong: Probability of Prevailing

Under the second prong of the anti-SLAPP analysis, we consider whether Wilcox has carried his burden of showing a probability of prevailing as to the merits of his claims. (See *Navellier, supra*, 29 Cal.4th at p. 88; § 425.16, subd. (b)(1).) However, Wilcox has not presented any argument concerning this aspect of the trial court’s decision. Accordingly, any claim has been abandoned or waived. (*Reyes v. Kosha* (1998) 65 Cal.App.4th 451, 466, fn. 6.) Our review is limited to those issues Wilcox has adequately raised and supported in his briefs. (*Kim v. Sumitomo Bank* (1993) 17 Cal.App.4th 974, 979.)

IV. DISPOSITION

The judgment is affirmed. Defendants are awarded their costs on appeal.

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HOLLENHORST

Acting P. J.

We concur:

MCKINSTER

J.

CODRINGTON

J.